

Submissions

[4] Mr. Corbett made submissions in support of the appeal and the application for leave. His argument may simply be stated as follows:

- (a) The appellant was the lawful owner and was in physical possession of the kava crop.
- (b) He lawfully purchased them from the owner thereof, Taniela Fotukava (Taniela) for \$2,000 (of which \$1,000 was paid at the time) and a male calf, the calf to be kept by the appellant until Taniela's father's funeral is held (when he would die) and then the calf be given for use thereat. He was thereby the lawful owner of the kava crop.
- (c) He harvested and was processing and packaging the kava when the police, at the complaint of Kesomi Siale who had purchased the crop from Taniela, seized it and charged him with theft of it.
- (d) The kava was sold and the proceeds (\$31,185) were, and are, held in a bank account of the Court to await the final disposal of this appeal.
- (e) The Court has acquitted the appellant of the charge of theft of the kava, but has made a finding that the ownership of the kava was still lawfully Taniela's because the appellant did not pay the full amount of \$2,000 (he only paying \$1,000) and also because the male calf agreed upon was being substituted by the appellant with a female calf instead, and that Taniela was justified in cancelling his sale of the kava plants to the appellant and in selling them to the complainant, Kesomi Siakumi, for \$18,000, instead. The Court ordered, at the same time (that it ordered the acquittal of the appellant) that the proceeds (\$31,185) now being held in the Court account, be paid to the complainant, Kesomi Siakumi, as lawful owner of the kava.
- (f) The Crown has not appealed against the order of acquittal of the appellant.
- (g) Mr. Corbett submits that that order to pay the proceeds to the complainant is unlawful. He submits that the proper order is to order that the proceeds be paid to the appellant because he was lawfully in possession as well as

being the lawful owner of the kava when it was seized and removed by the police, and because he has been lawfully found not guilty of having stolen the kava and the kava, or now the proceeds thereof, should be restored to him.

- [5] Ms. Kafa for the respondent argued in opposition to the appeal and application for leave. As to the application for leave, she submitted that although this Court has a discretion to grant or refuse leave, the discretion must be weighed against the public interest that appeals be brought and filed within a stipulated period – in order to bring proceedings to finality. She however agreed with and quoted the view of the High Court of Australia in *Kentwell v The Queen* [2014] HCA 37;

“... The discretionary power to extend the time limit is a legislative recognition that the interests of justice in a particular case may favour permitting an appeal or an application for leave to appeal to be heard, notwithstanding that it was not brought within time.”

That discretionary power is exercised and leave is granted where the appeal court in hearing the merits of the appeal finds that the order appealed against ought to be set aside or varied – as the justice of the case requires.

- [6] As to the merit of the appeal of the appellant, Ms. Kafa submitted that there was no merit in it because -

- (a) the Learned Magistrate had properly, after listening to the witnesses and considering their evidence (including that of the appellant) found and concluded that the original owner of the kava, Taniela Fotukava, had lawfully cancelled his sale agreement of the kava with the appellant because of breach thereof by the appellant in failing to pay the outstanding \$1,000 after nearly 3 years, and by substituting the agreed male calf with a much younger female calf, and that he had lawfully sold the kava to the complainant instead, and therefore lawfully ordered that the proceeds of the kava be paid to the complainant, instead of to the appellant, and
- (b) the reason why the appellant was acquitted of the charge of theft was not because he was the lawful owner of the kava but because he honestly believed, when he harvested and processed the kava, that he had lawful

right to do so, and so he was not “dishonest” in taking the kava and he believed honestly that he had ownership thereof, and was therefore not guilty of theft under S.143 of the Criminal Offences Act.

She accordingly submitted that leave to appeal be refused.

The law

[7] Where there is a claim by the accused in a criminal trial that he in fact is the owner of the thing alleged to have been stolen by him, and the complainant denies and disputes that claim, the criminal court has no jurisdiction to decide who the true owner of the thing is. Only a civil court with the jurisdiction to decide the same can decide it. The criminal court trying the person charged with theft of the thing has no need to decide who the owner of the thing is if the ownership is disputed between the complainant and the accused. In fact it has no authority to decide it. What it has authority to decide is whether or not the accused committed this offence with which he is being charged. All it needs to decide is whether or not at the time the accused took the thing he dishonestly took it without any colour of right in the thing with intent to deprive the owner of it or to deprive any other person who has an interest in it. If it finds that the accused took the thing whilst honestly thinking that he had a right to it, it must acquit the accused, and it must order the return of the thing to him. It must do that because he had the right to have it in his possession and it was wrong for the police to have taken it from him under the warrant issued by the Court. In the present case, the complainant ought to have sought a court order from the Supreme Court in its civil jurisdiction for the seizure and removal of the kava from the accused so that that Court, which has the jurisdiction to decide ownership of goods of value of over \$10,000, can properly decide the correct owner of the kava.

[8] It is true that the Criminal Court can make orders for return of properties to the rightful owner, but that can only be done where:

- (a) the accused person has been convicted of the theft (or other unlawful act), and
- (b) there is no dispute as to the ownership of the thing stolen, misappropriated, received, etc.

[9] That is provided for in S.192 of the Criminal Offences Act:

“192. Whenever any person is convicted of stealing or otherwise criminally obtaining any property, the Court may order that such property or any part thereof found in his possession or in the possession of any other person for him, shall be delivered to the person who from the evidence appears to the Court to be entitled thereto.”

Such order is not automatic or mandatory upon the conviction (hence the use of the words “the Court may”) because the ownership of the property may not always be clear. But the Court must certainly not order it if the accused is acquitted, and irrespective of the reason for the acquittal.

[10] So, unless the accused is convicted, the Court has no authority to order the giving of the property to any other person. It must order its return to the accused.

[11] Also, in the civil court, where disputes as to ownership are required to be adjudicated, the standard of proof required there is a much lower standard – namely, proof upon a balance of probability and not proof beyond reasonable doubt as is required in a criminal court.

[12] Also, the enhanced jurisdiction of the Magistrate’s court under S.11(4) of the Magistrate’s Court Act is only in respect of its criminal jurisdiction so that it can impose sentences of imprisonment up to 7 years and of fines up to \$50,000. It does not thereby have jurisdiction to decide civil disputes over \$10,000. In the present case, there is no dispute that the kava was worth \$31,185 which some was ordered to be and was held in the Court. For that reason, alone, the Magistrate Court in the present case had no jurisdiction to make any finding or order that the kava worth or money in place thereof of \$31,185 belonged to one person and not to the other.

[13] And furthermore it is not clear, and the issue needs to be decided by the civil court, whether or not the ownership of the kava still remained with Taniela Fotukava when he purported to sell it to Kesomi Siakumi. If he no longer had it, then all he could claim from the appellant is damages for breach of their sale agreement.

[14] Finally, clause 16 of the Constitution and section 51 (3) of the Magistrate's Court Act expressly provide for it. Clause 16 provides:

“16. It shall not be lawful for anyone to enter forcibly the houses or premises of another or to search for anything or to take anything the property of another except according to law. And should any person lose any property and believe it to be concealed in any place whether house or premises it shall be lawful for him to make an affidavit before a Magistrate that he believes it to be concealed and the place in which he believes it to be concealed and the magistrate shall issue a search warrant to the police to search for the property according to the affidavit so made.”

In pursuance of that provision, the complainant, Kesomi Siakumi secured the issue of the search warrant with which the police seized the kava which were in the possession of the appellant, which were subsequent sold for \$31,185 and which is kept in the Court account.

[15] Then S.52(3) of the Magistrate's Court Act provides:

(3) Every Magistrate shall preserve carefully till the conclusion of the case any article seized and brought before him under a search warrant and if any appeal is made or any person committed for trial shall order it to be detained for the purpose of the appeal or of evidence at the trial. If no person is committed to trial or if no person is convicted and no appeal made, the Magistrate shall order the article to be restored to the person from whom it was taken by virtue of the search warrant:

Provided that no such order of restoration shall be made if the possession of such article is an offence according to any law for the time being in force.”

That provision must be applied in the present case.

Result

[16] The result therefore is that there is merit in the appeal of the appellant and in view of the grave injustice which would result if the Magistrate's Orders are allowed to stand, simply because the appellant failed to file his appeal within the stipulated 28

days, it is in the interests of justice in the present case, that leave be granted for the appeal to be heard, and that the appeal be upheld.

Orders

[17] I make the following orders:

- (a) Leave is granted and the appeal filed by the appellant on 14 June 2019 is upheld.
- (b) The finding and orders made by the Magistrate Court on the seventh page of its (Tongan) decision to the following effect:

“At the same time I have stated that the sale of the kava plot B by Taniela to Kesomi was correct (lawful). Accordingly the money that was deposited into the Court from the marketing of the kava plot B, is the property of the complainant, Kesomi Siakumi.”

And its order dated 3 April 2019 that the sum of \$31,185.00 be paid back to Kesomi Siakumi are set aside.

- (c) The money being the sum of \$31,185 being held in an account of the Court in respect of this matter shall forthwith be paid by the Court to the appellant together with any interest accrued thereon.
- (d) The costs of the appellant in this appeal shall be paid by the respondent, to be taxed if not agreed.

NUKU'ALOFA: 2 August 2019




L. M. Niu
JUDGE